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BURDEN OF PROOF IN ACTIONS FOR MALICIOUS PROSECUTION.

In these days of proverbial conflict of decisions, it is indeed a relief to find unanimity of judicial opinion on even a single question of law. But it is due to an irony of fate that certain time-honoured propositions of doubtful soundness continue to rule the legal world, with unquestioned authority, while others obviously correct are time and again doubted. It seems to me that the law as to the burden of proof in actions for malicious prosecutions requires revision and the purpose of this article is to draw the attention of the Bench and the Bar to that need.

It was always enunciated in the following familiar terms: "In an action for malicious prosecution, the plaintiff has to prove, that he was innocent of the charge upon which he was tried, and that the prosecution was instituted against him without any reasonable or probable cause." I have not herein included certain minor points, which also the plaintiff has to prove, as they are not necessary for the purpose of this discussion. It is somewhat perplexing to find out, how the doctrine that the plaintiff must prove his innocence was evolved at all. Recently the Privy Council declared that the proposition of law "that the plaintiff must prove that he was innocent of the charge" was an erroneous one. (*Balbhaddar* v. *Badri Sah.*[1]) As suggested by their Lordships, the erroneous view should have arisen from, and continued to rest on, a confusion of pleadings with proof. In cases where the plaintiff had not been formally discharged or acquitted, and the prosecutions had ended in his favour other-

1 (1926) 51 M.L.J 42 (P.C)

wise—by the Crown entering a Noble Prosequi for instance—it is usual and natural for him to aver that he is innocent of the charge laid at his doors. So universal and invariable had the practice of making such an averment become, that practitioners and Judges considered that it was incumbent on the plaintiff to prove it, to entitle him to any relief. In the English Law, the plaintiff was only required to prove "that the proceedings complained of terminated in his favour." Vide *Basebe* v. *Matthews.*[2] If the proceedings complained of are, from their nature, such as could not so terminate, the plaintiff is not even required to prove "that they terminated in his favour." Vide *Steward* v. *Gromett*[3] and *R.* v. *Doherty.*[4] In the recent Privy Council case *Balbhaddar* v. *Badri Sah*[1] Viscount Dunedin, who delivered the judgment for the Board, has said as follows:—

"Proposition 2, as stated, is quite erroneous. (Proposition 2 referred to is this: 'In an action for malicious prosecution the plaintiff has to prove that he is innocent of the charge'). It should be 'that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating'. This phraseology may be found in the judgment of Montague Smith, J., in *Basebe* v. *Matthews*[2]". This Privy Council decision may be taken to have cleared the confusion of thought and the error of view that prevailed as regards one of the two aspects taken up for discussion.

About the other one, unfortunately, a large measure of inconvenience prevails both here and in England. But whereas the English Law appreciates the difficulties and inconveniences of the law, as it is propounded, the Indian Law does not. The rule as generally enunciated is "that the plaintiff must prove that the prosecution was instituted without reasonable or probable cause." Let us examine the position minutely. The criminal proceeding is started either on facts within the personal knowledge of the complainant or on information conveyed to him by persons with personal knowledge of such facts. In the former case, the only question for the Court to decide will be whether the charge was true or false, and there is no room for the application of the theory of "reasonable and proper cause." (Let me make myself clear. *A* prosecutes *B* alleging that he saw *B* steal and the prosecution terminates in *B's* favour. When *B* sues *A* for damages for malicious prosecution, the simple and

1 (1926) 51 M.L.J. 42 (P C).
2 (1867) L.R. 2 C.P 684 · 16 L T. 417.
3. (1859) 7 C.B. (N S) 191
4 (1810) 13 East 171

real question for the Court to decide will be whether *B* committed theft as alleged by *A* or not. The finding of the Criminal Court, though conclusive for the purpose of showing that the prosecution has terminated in *B's* favour, is not binding on the Civil Courts which have to hear the evidence and arrive at their own findings as to the truth or falsity of the charge.) This aspect is laid down in *Shubrati* v. *Shamsuddin*[5] and in *Radhe Lal* v. *Munnoo*.[6] In the latter case Sir George Knox, following the case in *Hira Lal* v. *Bandhu Bhagat*,[7] held that "where the charge is one which must have been true or false to the defendant's knowledge, and in which there could be no mistake on his part, no question of reasonable and probable cause arises." In the former case Justice Sulaiman held, following *Hira Lal* v. *Bandhu Bhagat*[7] and *Radhe Lal* v. *Munnoo*[6] as follows:—"If, as in the present case, the defendant pleads that his complaint was true and leads evidence to substantiate it, the question of truth or falsity of the complaint may arise at the instance of the defendant. And when such facts are professed to be within the knowledge of the defendant, the question of the truth or falsity of the complaint may also determine the question of want of reasonable and probable cause."

But, where the charge is laid on facts not within the complainant's knowledge, but communicated to him by informants, he cannot of course be expected to vouch for the truth of the facts alleged, though he ought to satisfy the Court that on the information furnished to him he acted *bona fide*, and as any man of ordinary prudence would have done. He ought to lay on the table the information he had and the existence of circumstances justifying the institution of the complaint. It is not enough if at best he has only reason to suspect the plaintiff. (*Busst* v. *Gibbons*[8] followed in *Ahmedbhai* v. *Framji Edulji*[9]) That means, he is expected to make due and full enquiries and satisfy himself about the truth of the charge he intends to formulate. In such cases, the question for adjudication will not be. whether the charge is true or not, but only whether the defendant had reasonable and probable cause to institute the criminal proceedings in question.

5. (1928) I.L.R. 50 A 713
6. (1913) 18 I.C. 280
7 A W N. (1889) 189
8 (1861) 30 L.J. Ex 75
9 (1903) I.L.R. 28 B 226

In both these cases, it would seem obvious, that the defendant must prove, that the charge is true or that he had reasonable and probable cause to institute the proceedings But, unfortunately, the Courts have always thrown the burden of proof on the plaintiff in both the cases. This practice, founded on case-law, is a serious invasion of natural rights, and a negation of well-recognised rules of evidence. It is always embarrassing to the practitioners and the Judges who have simply to follow the law as it is. The issue on this head is invariably in the following form:—"Was the proceeding instituted against plaintiff without reasonable and probable cause." It is cast in that form on the basis of authorities too numerous to mention which lay down that the plaintiff must prove that the prosecution was instituted without reasonable and probable cause.

When the plaintiff is called upon to prove either that the charge is false or that defendant had no reasonable and probable cause to initiate the proceedings, he is called upon to do the impossible, which I submit, is an invasion of natural rights When he is called upon to prove that he did not steal or assault, he is called upon to prove a negative. It is a well-known rule of evidence that the negative does not admit of direct and simple proof of which the affirmative is capable, and that he who avers a positive statement of facts must prove those facts. Does it not seem obvious that *A* who alleges that he saw *B* steal should alone prove that averment, because it is within his special knowledge, and *B* should not be called upon to lead evidence in the first instance that he did not. Sections 101, 103 and 106 of the Evidence Act may be usefully referred to Similarly again, when the question is whether the defendant had reasonable and probable cause, the only person who can swear to the definite facts and circumstances justifying the proceeding is the defendant. For reasons mentioned above, the plaintiff cannot be expected to lead evidence about facts and things within the personal knowledge of the defendant only. Apart from these two points of view, one is inclined to ask why the law as to burden of proof in actions for malicious prosecution should in any way differ from the law governing other actions. I can perfectly understand a special rule of evidence shifting the burden of proof in cases where for one reason or other presumptions exist. Is it possible to predicate that in an action for malicious prosecution there is a presumption to start with, that the plaintiff is guilty of the charge he was prosecuted for or that the proceeding must have been instituted with reasonable and probable cause? It is not.

It is an elementary rule of jurisprudence that everybody should be presumed to be innocent unless and until the contrary is proved and therefore there is no justification whatever for throwing the initial burden on the plaintiff. In cases where the complaint is filed on information, no presumption that it was filed with reasonable and probable cause will arise either. Presumption of good faith exists only in favour of officers and official acts and not in favour of the private transactions of other individuals.

The plaintiff is thus placed in a very perplexing situation. He realises he is called upon to do the impossible. He feels the injustice done to him by the malicious prosecution and the absolute necessity to seek reparation in a Court of Law. All that he can do, he does. He enters the witness box and swears about his innocence and challenges the other side to rebut his evidence. In practice, however, Judges have to, and do rest their findings on the evidence led by the defendant. In addition to the initial awkwardness to which the plaintiff is thus exposed, he is also made the target of attack in cross-examination, when the defendant's counsel can easily fling dirt at his character, honesty, reputation, etc. Very often, the innocent plaintiff easily survives the imputations. But all this need not be if the law were what it ought to be. Justly realising the extremely doubtful and flimsy character of the rule requiring the plaintiff to prove the above facts, it is laid down as follows:— "The plaintiff in proving the absence of reasonable and probable cause has to prove a negative and in general need only give slight evidence of such absence." (*Cotton* v. *James*[10] and *Taylor* v. *Williams*[11]). Why, I ask, should one respect a rule which is admittedly unsound on principle and difficult in practice, unless it be on the ground of *stare decisis*. In a matter of mere practice as to evidence, there can be no question of *stare decisis* either We have only to hope that some courageous Judge will boldly expose the fallacy of the existing rule, and revise the law as to burden of proof in actions for malicious prosecutions.

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10. (1830) 1 B & Ad. 128
11. (1831) 2 B. & Ad. 845, 857.

SUMMARY OF ENGLISH CASES.

STEPHEN *v.* COOPER, (1929) A.C. 570.

Workmen's compensation—Driver of a two horse mower for cutting corn—Attempting to refix a loosened chain—Workman abandoning the proper procedure and following a dangerous course—Omitting to put the cutting blade out of gear—Horses bolting off—Accident to workman—"Added peril" or "out of and in the course of employment."

A farm servant who was working as a harvest hand was engaged in driving a two horse mower for cutting corn. While driving the mower, a chain hooked to the backband of one of the horses became unhooked and had to be rehooked. The servant without putting the cutting blade out of gear walked along the sloping pole balancing himself as he went. The horses suddenly started forward and the servant losing balance fell on the blade and was permanently injured. The proper method of refixing the chain was not followed by him but this dangerous course was taken.

Held, the injury was sustained by an accident caused by an "added peril" to which the workman exposed himself by his own conduct and was not due to an accident arising out of his employment. The question in all these cases is whether the course taken by the workman was prompted by his own indolence or purely for his own convenience, and not in the interests of the work, or whether it was part of the injured workman's employment to hazard, to suffer, or to do that which caused the injury.

Lancashire and Yorkshire Ry. Co. v. *Highley,* (1917) A.C. 352 followed.

Doctrine of "added peril" discussed.

In re RAINE. TYERMAN *v.* STANSFIELD, (1929) 1 Ch. 716.

Will—Pecuniary legacies to godchildren contingent on their attaining 21—No provision for payment of interest on legacies towards maintenance—If the intermediate interest can be paid towards maintenance—Testator not in loco parentis *to legatee.*

By a will, a testatrix gave certain pecuniary legacies to her godchildren if and when they should attain the age of 21 years. One child was 9 years and another 14 years of age at the testatrix's death. The question arose if the income arising

from the contingent legacies could be paid towards the maintenance of the children. The will contained no express power of maintenance.

Held, the Law of Property Act does not deal with pecuniary legacies and therefore the law prior to the Act alone applied. According to it, the legacy will bear interest for maintenance if the testator stood in *loco parentis* to the infant. But a contingent legacy to an infant towards whom the testator does not stand in *loco parentis* and which is not directed to be set apart for the benefit of the infant bears no interest either for maintenance or otherwise until it vests.

In re Boulter, (1918) 2 Ch. 40 followed.

In re Moody, (1895) 1 Ch. 101 distinguished.

In re GOOCH. GOOCH *v.* GOOCH, (1929) 1 Ch. 740.

Will—Codicil—Settlement prior to will and codicil—Codicil referring to the settlement and directing the fund under the codicil to be held on the same Trusts as settlement so far as then applicable—Settlement varied by Divorce Court—If the codicil settlement also varied.

By his will, a testator gave his residuary estate to trustees in trust for his children who should attain the age of 25 years. By a later codicil, he declared that the share of his son Eric should be held, as to a moiety thereof in trust to pay and make over the same to the trustees for the time being of a marriage settlement, dated September 23, 1916, to be held by them upon the trust of that settlement "so far as the same should be then applicable and capable of taking effect." Under that settlement, a fund was vested in trustees to Eric for life and on his death to his wife *G* during widowhood and to Eric's children after them. After the testator's death, Eric's marriage with *G* was dissolved and the settlement of 1916 varied by Court giving *G* an immediate life-interest and the question arose if it varied also the trust under the will referring to the settlement.

Held, to construe the will so, will be not to give effect to the intention either of the Court or of the parties to that order. The effect of the codicil is not to put the will fund into the settlement so that from and after the testatrix's death every change in the beneficial interest in the fund originally settled will necessarily be accompanied by a corresponding change in

the beneficial interest in the fund, which is added to the settlement fund by the codicil.

In re Campbell's Trusts, (1922) 1 Ch. 551 followed.

COTTER *v.* NATIONAL UNION OF SEAMEN, (1929) 2 Ch. 58: 98 L.J. Ch. 323.

Trade Union—Resolutions intra vires*—Action against the Union by a few members thereof to restrain the Union from acting on the resolutions—Resolutions contended to be invalid on account of some irregularities—Action if maintainable by individual members.*

Some members of the respondent Trade Union brought an action to restrain the Union from carrying into effect a resolution passed by the Union at its general meeting to lend without interest £10,000 to another non-political Union. The grounds were: (1) its being *ultra vires,* and (2) irregularities in the meeting.

Held by the Court of Appeal affirming Romer, J., that the grant of the loan was *intra vires* and as for the irregularities, they were mere matters of internal management of the company which do not give a right to individual members of the company to come in their individual characters to seek to put an end to those proceedings. The rule in *Foss* v. *Harbottle* (2 Hare, 461) that if an act is *intra vires* the corporation, and therefore one which could be sanctioned by the majority of the corporators properly assembled in general meeting, the Court will not entertain any proceedings against that act unless when brought by a majority of the members, applies to trade unions also inasmuch as a registered trade union is a legal entity like other corporations, notwithstanding the fact that by S. 8, Trade Unions Act, 1871, the estate of the Union is vested in the Union for not merely the "benefit of the Trade Union" but of the members thereof also.

In re SMALLEY. SMALLEY *v.* SCOTTON, (1929) 2 Ch. 112.

Will—Construction of—Bequest "unto my wife Eliza Ann Smalley"—Lawful wife Mary Ann Smalley—Bigamous marriage of testator with Eliza Ann Mercer—Latter known in neighbourhood by repute as his wife—Testator's intention.

A testator (Arthur Smalley) by his will gave all his possessions to "my wife Eliza Ann Smalley." He had a lawful

wife and a false wife by a bigamous marriage, one not known to the other. The testator was living with the bigamous wife. The will was produced by her as having been given to her.

Eve, J., held that the gift to "my wife" was sufficient to identify the woman as his lawful wife and evidence of intention was not admissible.

Held, by the Court of Appeal reversing Eve, J., that the word "wife" can be used in the secondary sense to include a wife by repute. Neither claimant answers to the description strictly and therefore the surrounding circumstances can be looked at to ascertain the true intention.

Doe v. *Rouse*, (1848) 5 C.B. 422 applied.

REX *v.* HUNDINGDON CONFIRMING AUTHORITY, (1929) 1 K.B. 698: 98 L.J.K.B. 331.

Licensing—Confirming Authority—First decision to issue license unconditional—Alteration at a subsequent meeting pursuant to Licensing Justices' decision—If parties must be heard again—Proceedings if judicial.

On the application for a new license to certain premises in the county, the Licensing Justices decided to grant a license unconditionally after hearing both parties, but the Confirming Authority added two conditions to the grant of the license. The Licensing Justices accepted only one of the conditions and the Confirming Authority thereupon at a later meeting confirmed the license subject to that condition. But no notice was given of the later meeting to the interested parties nor were they heard on the conditional issue of the license.

Held (by Lord Hewart, C.J., and Acton, J., Avory, J., dissenting), that the Confirming Authority were not bound to hear the parties again, they having heard what all the parties had to say in the first instance; nor does the fact that some members who heard in the first instance were absent on the second occasion invalidate the proceeding inasmuch as a clear majority of those who were present at the first meeting voted at the second meeting also.

Held, by the Court of Appeal reversing the majority of the Division Bench, that the Confirming Authority when considering the question are acting judicially and must exercise their functions judicially. Accordingly it was incumbent on the Authority to meet again and hear the counsel and the other

parties concerned in the matter. Also the Confirming Authority ought to be composed in the same way on both occasions.

PRINCESS PALEY OLGA *v.* WEISZ, (1929) 1 K.B. 718: 98 L.J.K.B. 465.

International Law—Soviet Republic—Recognition of—Seisure of goods and sale thereof—Sale if valid and passes a good title to the purchaser—Independence of foreign Governments.

Against the plaintiff's will, a section of revolutionaries in Russia, whose act was subsequently adopted by the Soviet Government, took possession of the contents of her palace at Paley. The Soviet Government was recognised by the Political Department of the British Government in 1924. The properties in question in the action were in England in the possession of the defendants who claimed it by a sale from the Soviet Government.

Held, following *Oetjen* v. *Central Leather Co.* [246 U.S. 297], that when a Government is recognised by the Political Department of our Government as the *de jure* Government of the country in which it is established, such recognition is binding on the Courts, and is retrospective in effect so as to validate all the actions of that Government. Every sovereign State is bound to respect the independence of every other foreign State and could not inquire into the validity of such State's acts.

BROWN *v.* DAGENHAM URBAN DISTRICT COUNCIL, (1929) 1 K.B. 737.

Local Government—Urban District Council—Dismissal of Assistant Overseer without notice—Power to remove him at will—Contract to give three months' notice—If entitles clerk to three months' pay.

A clerk and Assistant Overseer of Dagenham Council was absent on three weeks leave when, without hearing him, he was dismissed from office for alleged misconduct by a resolution of the Council. Under the contract of appointment he was to have three months' notice.

Held, the plaintiff was entitled to arrears up to the date of removal but not to further salary for three months—the period of notice. The statute by S. 189 (Public Health Act, 1875)

empowered the Council to dismiss at their pleasure and the Council cannot divest itself of that power by a contract incompatible with it. The Court will not substitute its view of the misconduct—if true or not.

HOBBS *v.* TINLING & CO. AND HOBBS *v.* NOTTINGHAM JOURNAL, (1929) 2 K.B. 1: 98 L.J.K.B. 421.

Defamation—Libel—Defendants paying a certain sum as damages for alleged libel—No plea of justification—Plea of mitigation of damages based on same facts—Defendant if entitled to cross-examine plaintiff as to his character—Jury intervening and intimating to the Judge that evidence was enough—Failure of Judge to mention it to counsel—Judge not summing up—Unsatisfactory trial.

After the conviction of the plaintiff for an attempt to blackmail an Indian Prince, Mr. *A,* defamatory articles appeared in the defendants' papers purporting to give the previous history of his life. The plaintiff also pleaded an innuendo which was practically a repetition of the alleged libel. The defendants without pleading justification paid into Court 20*s*. as sufficient damages for libel and denied the innuendo. The plaintiff sought to prove that but for the solitary instance in *A's* case, his character was clean. The defendants' counsel cross-examined the plaintiff by putting to him specific incidents which were not mentioned in the libel. The cross-examination was allowed in spite of objection. In the middle of the examination, the jury intervened and intimated to the Judge that they had heard sufficient evidence. The plaintiff's counsel thereupon addressed the jury and the jury found for the defendants without any summing up by the Judge.

Held, the trial was unsatisfactory. Though the cross-examination may be admissible in so far as it tended to shake the credit of the witness, matter of justification cannot be given in evidence in order to mitigate the damages.

Scott v. Sampson, (1882) 8 Q.B.D. 491: 51 L.J.Q.B. 380 followed.

The jury must have been told that their intervention before the plaintiff's case was closed was not proper and they should have been directed with regard to the effect of the cross-examination. The communication from the jury should have been mentioned to counsel also.

FLEETWOOD-HESKETH *v.* FLEETWOOD-HESKETH, (1929) 2 K.B. 55: 98 L.J.K.B. 353.

Construction—Separation deed between husband and wife—Covenant by husband to pay super-tax on wife's income except in respect of her separate income in excess of £1,400—Method of assessing husband's liability to super-tax.

By a separation deed, the husband covenanted to pay his wife £3,000 and to discharge all super-tax "payable in respect of the income of the wife not coming to her under or by virtue of this indenture not in excess of £1,400 for any year." The wife's separate income exceeded £1,400 in one year and the question arose as to the calculation of super-tax payable by the husband for his wife.

Held, that in order to ascertain the amount of super-tax payable by the husband in respect of the wife's income, the proper way is not to marshal the two parts of the wife's income so as to prefer one part to another but to apportion the super-tax payable on the total income of the wife between them in the ratio of £1,400 to the total income, excluding the £3,000 under the deed.

WATTS *v.* BATTERSEA BOROUGH COUNCIL, (1929) 2 K.B 63: 98 L.J.K.B. 273.

Local Government—Housing and Town Planning Act, 1919, *S.* 28—*"Receiver of rack rent"—Work done by Borough Council in repairing houses belonging to the estate—Solicitor of the administratrix collecting rents for her—Solicitor, if "owner."*

A solicitor acting for the administratrix of an estate and on her behalf received the rents of the houses belonging to the estate from the builder who collected it from the tenants. The solicitor never collected it himself direct from tenants. The houses fell into disrepair and as notices to repair were not complied with, the Borough Council repaired the houses and claimed the expenses from the solicitor as the person for the time being receiving the rack rent of the premises in question. The question was if a solicitor acting for the owner can also be an owner within the meaning of the Act.

Held, by Scrutton and Sankey, L.JJ., affirming the decision of the Division Bench, that the solicitor was "an owner" within the meaning of the Act which contemplates several owners and the liability attaches to any one who receives the rent as rent though as agent.

Greer, L.J., dissenting.—An intermediary between the actual receiver of rents (here builder) and the owner is not a receiver of rents as rents have already been paid and received by the builder. The definition in the Act says "owner" means *and not "includes"* the person receiving rents.

PERRIN *v.* DICKSON, (1929) 2 K.B. 85: 98 L.J.K.B. 447.

Income-tax—Policy of insurance for education—Payment in annual instalments by insurance company to the guardian of assured—Covenant to pay back premium without interest less annuities paid in the event of annuitant's death before period—Whether such annual payment is an "annuity" liable to income-tax.

By a policy of insurance, it was agreed that on condition of appellant paying a certain annual premium for six years, the company would pay his son, from after that period, a certain sum annually for seven years as for the boy's education; that further in the event of the son's dying before, the company would pay the appellant or his representative the paid-up premium without interest less any sums paid to the son up to then. The question was if these annual payments to the son were not "annuities" within the meaning of the Income-tax Act, 1918.

Held, by Rowlatt, J., that the amounts were not "annuities" but merely repayment of the capital with interest in one contingency and without interest in another contingency and as such only such amount as could be said to have been received for interest was assessable.

PATTERSON *v.* ROBINSON, (1929) 2 K.B. 91.

Shipping—Seamen—Neglect of duty—Charge of—No entry in the Official Logbook—Entry in book if a condition precedent to complaint—Merchant Shipping Act, 1894, *S.* 228.

To a complaint against the seamen by the master of a ship for unlawfully combining together to neglect duty, the entry in the logbook is not a condition precedent, though the Act enjoins in the interests of the seamen such an entry being made on pain of fine being imposed for failure to keep the log. The Act makes an entry in the logbook admissible in evidence but does not make it the only evidence.

Per *Avory, J.*—"If this were not the true view, it would, in my opinion, lead to the absurd result . . . . that if a seaman

or a number of seamen assaulted the master and the other officers and rendered them incapable of making an entry in the log-book, they would thereby save themselves from ever being proceeded against or punished for the offence. . . ."

LONDON COUNTY COUNCIL *v.* MAHER, (1929) 2 K.B. 97: 98 L.J.K.B. 492.

Education—Parent omitting to send his son to a certified school—Sending child to an uncertified school—Certified school being residential and twelve miles away—Education Act, 1921, *S.* 49, *if exhaustive of reasonable excuses for non-attendance.*

A mother of a deaf child aged fourteen took steps to provide efficient instruction to the child but the complaint was preferred against her that she did not send the child to a school certified as suitable for education. It was found that such a school was 12 miles from her residence and no proper conveyance was provided for the child.

Held, S. 49 is not exhaustive of the list of reasonable excuses for a parent. The section enumerates certain excuses which, if established, must be accepted willy-nilly by the tribunal and if other excuses are pleaded, option is given to the tribunal to accept it or not. The section says that the following *shall be* reasonable excuses and does not say "There shall be no reasonable excuse except them."

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* GORDON, (1929) 2 K.B. 105: 98 L.J.K.B. 486.

Landlord and tenant—Mortgage—Mortgagor authorising tenant or mortgagee—Mortgagor undertaking to pay periodically towards capital—In default for three lunar months, the mortgagee entitled to enter into possession—Default—Notice by mortgagee to quit—If Small Tenements Recovery Act Justices have jurisdiction.

Under a mortgage executed by the respondent, he undertook to make monthly payments towards capital and empowered the mortgagee to enter into possession of the property if default was committed in payment of three instalments. The mortgagor also attorned tenant from year to year to the appellant society and it was further provided that when the society became entitled to enter into possession, the society may determine the tenancy on seven days' notice in writing in that behalf. The

mortgagees gave such a notice of seven days but the mortgagors refused to quit. On an application under the Small Tenements Recovery Act, 1838, for an ejectment warrant.

Held, that the Courts of Summary Jurisdiction have power to deal with some cases where questions of title are involved and the effect of the clause fixing seven days' notice was that such a notice was sufficient to determine the tenancy created by the deed, although it was a tenancy from year to year, as the Act contemplated a determination of tenancy by a "legal notice to quit or *otherwise*."

Friend v. *Shaw*, (1887) 20 Q.B.D. 374 and *Arden* v. *Boyce*, (1894) 1 Q.B. 796 distinguished.

GRIFFIN *v.* GREY COACHES, LTD., (1929) 98 L.J.K.B. 209.

Hackney Carriage—"Plying for hire," meaning of—No license to ply within a "prescribed distance"—Poster inviting passengers put up within the prescribed distance and tickets also issued there—Motor coach not waiting to pick up at the time of sale of tickets—Antecedent contract, meaning of—Town Police Clauses Act, 1847, *S.* 45.

By posters attached near a garage situated within the "prescribed distance" in Brighton county, the respondent company invited the public to travel by one of their coaches. The issue of the tickets for the journey is closed some time before the coach is brought there. The question arose if the respondents plied for hire when "there had been no waiting for passengers by the motor coach but an antecedent contract of carriage in each case."

Held, the poster constituted a general invitation by the persons in charge of the vehicle to the members of the public to make contract for carriage in the vehicle and a man might ply for hire with a carriage without exhibiting it.

Sales v. *Lake*, (1912) 1 K.B. 553: 91 L.J.K.B. 563 distinguished as an exceptional case on the facts.

JOTTINGS AND CUTTINGS.

Administrative Law.—Professor De Montmorency, in a letter to Thursday's *Times*, gives a new turn to the discussion on the extension of "Administrative Law". He calls in aid a parallel with the similar process which was going on in the

Roman Empire in the Third Century of our era. The transference of the judicial power to the Executive from the Judiciary was a phenomenon specially manifested then, as it is also a phenomenon specially manifested in the British Empire to-day. He forbears to point out that the Roman Empire was already on the verge of "Decline and Fall," and so press the parallel further, and we will exercise the like forbearance. And perhaps, even then, Rome had a couple of centuries to look forward to. But while in Rome and her provinces "the administrative system undermined the law, in our Empire it boldly sweeps it aside." Prof. De Montmorency has his remedy. He recognises that "the slow judicial method" cannot be preserved in its entirety, and the French system of Administrative Law, while excellent in France, is not in accordance with "British lines of judicial thought." Hence he recommends the creation of Courts, in the strict sense of the word, which can review administrative action, while legislation shall prescribe the procedure to be followed by the Departments in deciding cases withheld by statute from the purview of the ordinary Law Courts. The letter is useful and suggestive.—*L.J.*, 1929, p. 138.

Imprisonment for Debt in Turkey.—A new law dealing with debtors has come into force (writes *The Times* correspondent). Whereas before, persons who failed to pay their debts regularly were imprisoned, under the new law offences of this description may not be punished with imprisonment. All those serving sentences for debt have been released.

The effect of the new law will be felt chiefly in the lower classes, the members of which habitually borrowed money without security, and were induced only by fear of imprisonment to honour their debts.—*L.J.*, 1929, p. 162.

The Rejected Robes.—The late Earl of Rosebery showed characteristic thoughtfulness in bequeathing his robes as Chancellor of the University of London for the use of his successor. Most official robes are costly, and even in the highest of offices it used to be customary for an incoming dignitary to try and purchase the robes of the man he was succeeding.

It was so among Lord Chancellors, but when Lord Erskine ascended the Woolsack, in succession to a notorious evil-liver,

he chose to break with tradition. The retiring Lord Chancellor sent his valet to inquire if Erskine would purchase his ermine. "Tell him," replied Erskine, "that I do not propose to take up the abandoned habits of my predecessor."—*L.J.*, 1929, p. 162.

The Chief Justiceship and the Law.—The *Daily Telegraph* is publishing in a series of articles Lord Hewart's book on "Bureaucracy," which has for some months been known to be in preparation. It is not too much to say that the appearance of the book, under the title "The New Despotism," will be an event of constitutional importance. It is welcome, and it is fitting, that this exposure of the intrusion of Government Officials into the domain of the Judiciary should come from the Lord Chief Justice of England, a title which rivals and perhaps excels that of the Lord Chancellor. For the Lord Chancellor is very much besides a judge. The Lord Chief Justice is in his office a judge alone, and the guardian of the Common Law. The passage of 300 years has buried in oblivion—or in "fusion"—the stand which Coke made for the Common Law against Equity. That may have been a mistake, but it was otherwise with his attack on the prerogative of the Crown which cost him the Chief Justiceship and has passed into history. It was later, when he was only a Parliament man, that, as a preliminary to the drafting of the Petition of Right, he said: "The State is inclining to a consumption, yet not incurable; I fear not foreign enemies; God send us peace at home. For this disease I will propound remedies."—*L.J.*, 1929, p. 163.

"Administrative Law."—It is a different battle that now is joined, and a different disease that has to be diagnosed. Coke's "strong and manly eloquence," in Ben Jonson's epigram on him, may have involved danger of the Tower and worse. In fact, however, the Royal displeasure vented itself in a command to correct his Reports, which in Jame's opinion were bad in law and subversive in politics. Lord Hewart will not go to the Tower, and he has not been guilty of Reports. None the less there is a distinct struggle now going on between the regular law of the land—the Rule of Law—and what by contrast is known as administrative law. Administrative law in the view of Lord Hewart is no law at all. We will not discount the effect of his argument when it is complete, and one quotation shall suffice. After describing the secret decision

of disputes by Departmental officials, he says: "To apply the terms administrative 'law' and administrative 'justice' to such a system or negation of system is really grotesque." At present the system has legislative sanction in numerous Acts of Parliament, and when the House of Lords had to consider the statutes in *Local Government Board* v. *Arlidge* (1915, A.C. 120) it had to give it judicial sanction. But that is no reason why a system, started surreptitiously and gathering strength as it goes, should not be checked. The authority of Lord Hewart's book should be very efficient for this purpose, and we await the remedies that he will propound for "this disease".—*L.J.*, 1929, p. 164.

Judge Jeffreys' Chambers.—There has been of late a revival of interest in that enigmatic figure, Judge Jeffreys. Jeffreys and the Bloody Assize are two names inseparably linked in English history, and the most recent study on both may be found in Sir Edward Parry's latest book. But, as Lord Birkenhead has pointed out, there are aspects of Jeffreys' career which do not merit the same wholesale condemnation that attaches to his reputation in Crown prosecutions. In whatever light we view him, he was a forceful personality, and any link with him existing to-day is of interest. We would, therefore, draw our readers' attention to two articles (the second of which appears to-day) in which the whereabouts of Jeffreys' chambers in the Inner Temple receives fresh investigation. It has hitherto been supposed by historians of the Temple that these were in Hare Court, in a building destroyed by fire in the year 1677. But Mr. Melville Balfour, the writer of the article, believes this to be erroneous and that, in fact, they were in the still existing No. 4, King's Bench Walk. On the conclusiveness of the evidence which Mr. Balfour adduces we do not presume to comment, but if his case be made out, No. 4 will be invested with an interest not confined to the Inner Temple alone.—*L.J.*, 1929, p. 165.

The Rejected Robes.—A correspondent points out an error which by inadvertence was made in a paragraph in The Law Journal last week. This purported to deal with Lord Erskine's Chancellorship and turned a well-known witticism into a libel on the character of Lord Eldon. Fortunately a libel on the dead is not actionable. In fact, as our correspondent points out, the story related to Henry Erskine, the younger brother of Thomas,

the Lord Chancellor. There was an eldest brother, the Earl of Buchan—not especially distinguished—who, when he remarked to the Duchess of Gordon: "We inherit all our cleverness from our mother," received the stinging reply: "I fear that, as is usually the case with the mother's fortune, it has all been settled on the younger children." Henry Erskine in 1783 succeeded Henry Dundas, afterwards Lord Melville, as Lord Advocate; Dundas considered himself so indispensable that he said: "No man in Scotland will venture to take my place." But he reckoned without Henry Erskine, and it was on the occasion of that change in the office that Dundas, foreseeing only short use for the silk gown Erskine would have to buy, offered him his own. "It is hardly worth while" he said; "for the time you will want it you had better borrow mine." And then Erskine: "From the readiness with which you make the offer, Mr. Dundas, I have no doubt that the gown is a gown made to fit any party; but, however short my time of office may be, it shall never be said of Henry Erskine that he put on the abandoned habits of his predecessor." The story is only an illustration of ready wit, and there was no imputation on the private character of Lord Melville, though he was impeached 20 years later—and acquitted—for alleged improper conduct as Treasurer of the Navy.—*L.J.*, 1929, p. 165.

The Independence of the Bench.—One of Lord Hewart's articles on "The New Despotism," now being published in *The Daily Telegraph,* deals with the proposal for a Minister of Justice (25th instant), and treats that proposal as involving the independence of the Judges. Whether it would do so depends upon the nature of any scheme for the redistribution of the functions, as regards the administration of justice, of the Lord Chancellor and the Home Secretary, and it should be a part of such scheme to keep the appointment of Judges above suspicion. "A strong case is made out for the appointment of a Minister of Justice." So it was said in the Report of the Machinery of Government Committee in the tenth and final Part dealing with Justice, a part which Lord Haldane, the Chairman of the Committee, wrote with his own hand: *see* his Autobiography, p. 253. But his object was to prevent the overlapping of the functions of the Lord Chancellor's Office and the Home Office, and although he proposed to divest the Lord Chancellor of judicial duties—he himself did not undertake such duties in his last Chancellorship—we doubt whether he would have been a party to any scheme which threatened the independence of the Judicial

Bench. He was keen on the appointments of Judges being made only on high legal and professional qualifications, and the present practice in this respect is perhaps due to the efforts of Lord Oxford, when he was Mr. Asquith, and himself.—*L.J.*, 1929, p. 178.

A Minister of Justice.—But Lord Haldane has gone, and though Lord Passfield, as Mr. Sidney Webb, was another member of the Machinery of Government Committee, there appears to be no scheme now on foot for carrying out its recommendations Any necessity for it has, indeed, been averted by the recent development of the permanent secretariat to the Lord Chancellor. This, according to Lord Birkenhead, the protagonist hitherto against the suggested Ministry (see *Points of View*, Vol. I, Chap. 4), is the offspring of Lord Selborne and Lord Muir Mackenzie, and their work has been admirably carried on by Sir Claud Schuster. Lord Birkenhead's criticism takes the same line as Lord Hewart's; the appointment of the Judges, he thinks, would be transferred to the Minister of Justice, and he demonstrates—with what correctness we need not say—that the Minister would of necessity be a lawyer who was himself not in the running for judicial appointment, and therefore not of the first rank. At present the Lord Chancellor, while he appoints all the High Court and County Court Judges, does not make the highest appointments. The Lord Chief Justice, the Lords of Appeal, the Master of the Rolls, the President, and the Lords Justices are all appointed by the Prime Minister, but we should imagine he takes counsel with the Lord Chancellor. One observation which Lord Birkenhead makes may be quoted: "The position of the Lord Chief Justice and of the Master of the Rolls must, like that of the Attorney-General, be enhanced by the disappearance of the Lord Chancellor." So Lord Hewart's criticism may be regarded as altruistic.—*L.J.*, 1929, p. 178.

Dangers of the Streets.—The second report of the London and Home Counties Traffic Advisory Committee on street accidents in Greater London brings home to the reader with great vividness the risks which the pedestrian has to face in the more frequented streets of London. Comparing accidents with the estimated population of Greater London—a figure which is useful only to enable one to establish a standard of comparison—it appears that in 1921 one person out of every 12,970 was killed, and one out of every 322 injured, whilst in 1927 one person

out of every 7,292 was killed and one out of every 159 was injured. In very congested areas where the traffic necessarily moves relatively slowly and is strictly controlled, the chief cause of accidents to pedestrians appears to be "crossing without due care"; and out of 1,554 fatalities for the two years 1927-1928, no less than 678 are officially attributed to this. So far as children are concerned, the separate report on street accidents to children states that running across the street without due care was the cause of more than one-third of the fatal accidents to children. The problem of how the appalling mortality caused by street accidents in cities is to be prevented is a very difficult one; but it is essentially different from the question of the prevention of accidents on country highways, where the majority of accidents involve collisions between two or more vehicles. The pedestrian in the towns is slow to realise that there is a responsibility on him to make sure that he can safely cross a crowded street; we are all, for instance, too apt to try to dodge between vehicles moving at different speeds. Sub-ways under dangerous crossings are one way of dealing with the problem; but it is notorious that the pedestrian is very slow to take advantage of such of these as exist. Plainly marked crossing places are also useful. So far as the problem of safety on the roads relates to cities and towns the main solution appears to lie in the education of the pedestrian; so far as it relates to country roads and to villages, it depends upon the education and control of the motorist.—*L.J.*, 1929, p. 178.

The Freedom of the Seas.—Legally the Joint Statement of the result of their conversations which has been issued by President Hoover and the British Prime Minister has no immediate effect, but it may be expected to have important results in the settling of long-standing differences as to the Laws of Maritime Warfare. It is presumably to this and related questions that reference is made in the mention of "important technical matters requiring detailed study," and they are to be the subject of active consideration Popularly the topic of these questions is known as "The Freedom of the Seas." It involves the right of capture of private property, and the right of neutral States to trade with belligerents. But British doctrines have been the result of special conditions, and other countries, as they become subject to similar conditions, tend to approximate to the same views. Possibly in a Code of International Law, a common basis can be arrived at. Henceforth, however, accord-

ing to the Joint Statement, the Kellogg Pact is to be accepted, not only as a declaration of good intentions, "but as a positive obligation to direct our national policy in accordance with its pledge." The implication of this is that the question of the "Freedom of the Seas" will cease to be a matter of contention. Possibly this is too optimistic.—*L.J.*, 1929, p. 213.

The State of the Lists.—The new legal year commences to-day, and the Courts will resume on Monday with a total of 83 appeals and 2,111 causes for hearing. There is a substantial reduction in the number of appeals as compared with last year, and the figure, 83, is, indeed, we believe, the lowest for the commencement of any Michaelmas Sittings during the present century. This year's total of 83 is made up of 16 Chancery Appeals, 35 King's Bench appeals, 8 Workmen's Compensation cases and 24 others, including 11 interlocutory appeals; and it compares with 112 a year ago, 479 in 1901, 363 in 1913, and 211 in 1921. Small appeal lists are very satisfactory from every point of view except, perhaps, that of the counsel and solicitors engaged in them; they indicate very reliably the quality of the justice dispensed by the Courts of first instance, although the question of expense no doubt deters some litigants from carrying an adverse decision to appeal. One natural result of the smaller appeal lists is that cases which are the subject of appeal are now finally decided in a very much shorter time than was formerly the case; it is now no uncommon thing for an appeal to be heard in the same term as that in which the case was originally tried; and the days, not so many years ago, when there was little or no prospect of an appeal coming on within a year of its being set down, seem to be, and we hope are, gone for ever.—*L.J.*, 1929, p. 213.

Taking the Oath.—Mr. Sylvain Mayer, K.C., in a letter to *The Times* of October 11, compares the method in which the oath is administered to witnesses in Germany with that in our English Courts, very much to the advantage of the former. In Germany, the presiding Judge administers the oath, and he, and all present in Court, stand whilst the witness is being sworn. In this country, says Mr. Mayer, the oath is administered in a very perfunctory manner.

As a rule the Clerk of Assize or the Associate does it, but if these gentlemen are not in Court it is administered by the Judge's clerk.

Very little notice is taken of it, and very often conversation is carried on in the body of the Court whilst the witness is being sworn

There is only too much truth in this criticism; and we entirely agree with Mr. Mayer that if more solemnity were introduced into the administration of the oath, there might well be less perjury than at present. The Divorce Courts, where perjury is admittedly very prevalent, set a particularly bad example. The words of the oath are printed on a card which lies on the ledge of the witness-box; and the oath is administered by the usher, who hands the witness the Testament, and directs him to read from the card. During this process there is usually a buzz of conversation in Court. But it is not, we think, necessary to adopt the German procedure to ensure the proper and solemn administration of the oath; it would be quite sufficient if the practice of the Chancery Division in this respect were universally followed. In that Division the oath is administered by the Registrar, who rises for the purpose. The usher hands the Book to the witness and directs him to hold it up—and he then calls for silence. The Registrar waits until the Court is still, and then administers the oath slowly and plainly. If any person speaks, or even if counsel restles a paper, he stops and begins again; and if there is any difficulty in obtaining complete silence, the Judge personally intervenes and directs that silence be kept whilst the witness is sworn. A direction by the Presidents of the other Divisions that the Chancery procedure in this respect should be followed is all that is necessary to effect a most desirable improvement.—*L.J.*, 1929, p. 234.

Selling a Wife.—We get from time to time stories in the Press of wife-selling, but they always seem a little apocryphal. However, in an article, "Wife-Selling in England," in the current *Law Quarterly Review,* Prof. Courtney Kenny shows that there is a good deal of truth in them. Sheffield and Manchester, and Smithfield Market in London, and another Smithfield in Birmingham, had, according to him, a bad pre-eminence in this respect, and he points out that, unless the practice had penetrated into Wessex, Hardy would have scarcely made it the starting point of *The Mayor of Casterbridge.* The last instance Prof. Courtney Kenny has noticed was at Sheffield in 1887. Of course, it is easy to show that the transactions were illegal, and he refers to *Rex* v. *Mears* (4 Cox C.C. 423, 427) and *Rex* v. *Howell* (4 F. & F. 160). Both these, the first in 1851 and the second in 1864, were cases of conspiracy to procure illicit intercourse, and

though wife-selling was not in question, the analogy is obvious. But while essentially unlawful, there was a certain assumption of regularity. When the sale took place in a public market, the accustomed market toll was levied and paid, and the subject of the sale had to be led to market by a rope—sometimes a ribbon—and handed over and led away in the same fashion. And Prof. Courtney Kenny has even found in the British Museum a bill of sale of a wife made at Midsomer Norton, Somerset, and dated October 24, 1766, which from is technical form seems, he says, to have been copied from a precedent book. It is under hand and witnessed, and the grantor, for the sum of six guineas, "doth sell, assign, and set over" his wife to the purchaser, "with all right, property, claim, services, and demands whatsoever" that the grantor has in her for the term of her natural life It would be interesting to discover the genesis of this instrument, but we fear a search of the Precedent Books of the eighteenth century would be hopeless. Perhaps it was due to the imitative ingenuity of a Somerset attorney's clerk.—*L.J.*, 1929, p. 235.

Lord Mersey.—It is with real regret that senior members of the Profession in particular will learn of the sudden death of Lord Mersey. A sound lawyer with a knowledge of the world, a strong and fearless personality, and a keen sense of public duty, he was markedly successful as a Judge of commercial cases, and as such rendered most valuable service in the King's Bench Division, and in his later days in the two final Courts of Appeal. Promoted at the age of seventy to be President of the Probate, Divorce, and Admiralty Division, he held office there for thirteen months only, but it was characteristic of his public spirit that, on the passing of the Administration of Justice Act, 1920, he should have been ready, at the advanced age of eighty-one, to return and lend his aid in clearing off the mass of arrears which had accumulated in the department of Divorce. It is interesting to recall that, amongst the many commissions over which Lord Mersey ably presided were those which inquired into three singularly tragic losses at sea, those of the *Titanic*, the *Empress of Ireland*, and, lastly, the *Lusitania*.—*L.T.*, 1929, p. 173.

Waiver of Diplomatic Privilege.—May diplomatic privilege be waived by the person entitled to claim the same? The answer is in the affirmative according to the ruling of the Lord

Chief Justice in *Dickinson* v. *Del Solar* (*Mobile and General Insurance Company, Ltd., Third parties*), reported in *The Times*, 1st August. In that case the defendant, acting on the instructions of his superior, who was the Peruvian Minister in this country, waived the diplomatic privilege to which he was entitled, and submitted to our jurisdiction by entering an appearance to an action in which damages were awarded against him for negligently injuring the plaintiff.' The third parties with whom the defendant was insured had taken up the line that the assured had acted to the detriment of the company's interests within the terms of the policy by failing to exercise the privilege which would have rendered him immune from proceedings. It was held, however, that the judgment against the defendant created a legal liability against which the insurance company had agreed to indemnify him. On the point of waiver it is surprising that there should have been any argument in view of the authorities. In *Suarez* v. *Suarez*, (1918) 1 Ch. 176, a minister of a foreign state in England was sued for an account as administrator to an intestate's estate; he waived his diplomatic privilege and instructed his solicitors to accept service of an originating summons in the proceedings. It was held by the Court of Appeal, following *Taylor* v. *Best*, (1854) 14 C.B. 487, that an ambassador or public minister can, with the consent of his government, effectually waive his privilege and lose the immunity conferred thereby. The same rule was laid down by the House of Lords in *Duff Development Co., Ltd.* v. *Kelantan Government*, (1924) A.C. 797. There still remains a doubt, however, as to whether execution can issue on a judgment obtained against a person who has waived his diplomatic privilege. This question was discussed, but did not arise for decision in the last-mentioned case, *vide* Lord Sumner, at p. 830 of his judgment.—*S.J.*, 1929, p. 533.

The New Judge.—The vacancy created in the Chancery Division by the retirement of Mr. Justice Astbury has been filled by the appointment of Mr. C. J. W. Farwell, one of His Majesty's counsel practising in that division. Sir John Astbury, though perhaps not the most outstanding of our Chancery Judges, was a sound lawyer and a very practical man with possibly a little too much leaning towards inducing parties to settle Prior to his elevation to the bench Sir John was one of the busiest men of his day, being the outstanding leader of the "patent" Bar. His health has not, during the past few years, been any too good—in fact not very long ago he was

said to be in considerable danger of losing his eyesight; from this tragedy happily he was preserved, and we all hope that in his retirement he will enjoy many years of improved health after a strenuous career at the Bar and valuable service upon the Bench. His successor, Mr. Justice Farwell, must, indeed, have the Chancery tradition bred in his bones, for he is the son of the late Lord Justice Farwell, and a grandson of the late Vice-Chancellor Wickens. He was called to the Bar at Lincoln's Inn in 1902, of which Inn he is now a bencher, and after a very successful career as a junior took silk early in 1923. As a leader he enjoyed the reputation of being one of the best lawyers in Lincoln's Inn, and his practice, though by no means inconsiderable, was not so great as his ability deserved. For some years he was attached to Mr. Justice Romer's Court, and it is said that he was one of those silks who benefited considerably when the Chancery Courts were thrown open. His appointment was no doubt somewhat of a surprise to the prophets in these matters, but there is no doubt that Mr. Justice Farwell will carry with distinction the ancestral mantle which has fallen upon him.—*S.J.*, 1929, p. 667.

CONTEMPORARY LEGAL LITERATURE.

The following extracts from a short article entitled "Wife-selling in England" by Mr. Courtney Kenny in the *Law Quarterly Review* (for October, 1929) will afford interesting reading:—

An aristocratic instance, as old as the reign of Edward I, of the transfer of a wife is cited by Dugdale (Baronage, I, 767). The wife of Sir John de Camoys had eloped with Sir William Paynel; and to the adulterer Sir John 'spontanea voluntate mea' made, by grant under seal, a gift of the lady, together with her goods and chattels. After the husband's death, Sir William married her; and he and she then, in 28 Ed. I, claimed dower for her out of Sir John's lands. But in 30 Ed. I, judgment was given against them, on account of her adultery; and the deed of grant, on which they had relied, was of course treated as no excuse.

The great majority of those who took part in wife-selling seem to have had no doubt that what they did was lawful, and

even conferred legal rights and exemptions. They were far from realizing that their transaction was an utter nullity; still less that it was an actual crime and made them indictable for a conspiracy to bring about an adultery.

Lord Mansfield could recall (3 Burrows 1438) 'a cause in the Court of Chancery wherein it appeared that a man had formerly' (?formally) 'assigned his wife over to another man. And Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners.'

From the beginning of the last quarter of the eighteenth century until nearly the end of the nineteenth one, journalists frequently recorded instances of wife-selling. The last that I have noticed was in 1887 at Sheffield. That town and also Manchester and the metropolitan market of Smithfield and a market of the same name at Birmingham appear to have been conspicuous for the practice. Had it not penetrated into Wessex too, Hardy would scarcely have ventured to make it the starting point of his 'Mayor of Casterbridge.'

In no instance of which I have read does the wife appear to have exhibited any reluctance to be alienated. Nor is this surprising; for she might well think that by any average Englishman she would likely to be better treated than by a husband who had so conspicuously shown his disregard for her.

The prices paid differed very markedly; ranging from a pint of beer to a handful of guineas. For there would be corresponding differences in the attractiveness of the ladies themselves; and also in the zeal of their purchasers, for the buyer might be merely a casual stranger or, on the other hand, an attached paramour.

Customary solemnity required that the husband should lead the wife into the market by a halter—usually of rope but sometimes of ribbon—and that the purchaser should take his halter and lead her away by it.—Cf. *The Times* of March 30, 1796, and July 18, 1797.

But the strongest proof of the high current estimate of the efficacy of these transactions is the trouble sometimes taken to create formal evidence of them A striking instance of this is preserved in the British Museum (Additional Mss. 32,084). It is a bill of sale of a wife, couched in such full technical form

as to suggest that it may have followed some accustomed precedent.

The assignment runs thus:—

'Memorandum.

'Oct. 24, 1766.

'It is this day agreed on between John Parsons, of the Parish of Midsummer Norton, in the county of Somerset, clothworker, and John Tooker, of the same place, gentleman, that the said John Parsons, for and in consideration of the sum of six pounds and six shillings in hand paid to the said John Parsons, doth sell, assign, and set over unto the said John Tooker, Ann Parsons, wife of the said John Parsons; with all right, property, claim, services, and demands whatsoever, that he, the said John Parsons, shall have in or to the said Ann Parsons, for and during the term of the natural life of her, the said Ann Parsons. In witness whereof I, the said John Parsons, have set my hand the day and year first above written.

'JOHN PARSONS.

'Witness: WILLIAM CHIVERS.'

Mr. Arthur E. Langman of Toronto has in an article on 'Municipal Taxation of Incorporeal Rights' contributed by him to the *Canadian Bar Review* (June 1929) suggested legislative reform in the law of Ontario regarding taxation with respect to easements and incorporeal rights in land. As the writer points out referring to 1895 A.C. 133, 9 B. & C. 95, 9 B. & C 820, 9 B. & C. 114, and 1893 A.C. 416, in England it has been held that Easements as such are not rateable or taxable. As incorporeal rights can have no independent existence, the suggestion by the author is that they should be taxed as a part of dominant tenement to which they are appurtenant. There is very great force in the argument advanced that when once an incorporeal right is granted over property *A* in favour of property *B*, the value of *A* is to that extent diminished and that of *B* enhanced. One practical difficulty is also suggested in favour of this plea If a servient owner creates a number of incorporeal rights and then finding his property not worth the heavy tax allows the property to be sold for non-payment of taxes, then it raises the question whether the sale will extinguish the third party's incorporeal rights, when for aught

one knows, the third party might not even have known of the default.

Professor William S. Holdsworth, a member of the Sir Harcourt Butler Committee appointed to enquire into the problem of the Indian States has contributed a short article to the New York University *Law Quarterly Review* for September, 1929, wherein he deals with the anomalous position occupied by the Indian States and some of the reasons which led the Committee to report as they did. The two Indias, as the professor calls them, *viz.*, British India and the Indian States, differ markedly in their administration and relationship to the Crown. The King-Emperor reigns supreme over both, but with this important difference that whereas he rules British India through a machinery set up by him ranging from the Secretary of State for India down to the Governors of the provinces and civil servants, he governs the States only indirectly and to a limited extent. The Indian States occupy a little more than a third of the entire India with a population of roughly a fifth of the whole of India. There are about 562 States, some of considerable area, while many are small, some even less than a square mile. In the larger States, the rulers have legislative, executive and judicial powers over their subjects and are given a seat in the Chamber of Princes in their own right, while the smaller ones have only a right to elect a representative to sit in the Chamber. The writer traces the origin of the bifurcation into British India and states to the policy of the East India Company which, consistently with its purpose, namely of securing facilities for expanding their trade, concerned itself only with the rich and accessible sea coast and the great river estuaries and left the interiors ruled by warlike tribes alone. The writer discusses the nature and relationship between the Princes and the Crown during four stages.

(*i*) *Down to the year* 1813.—The East India Company was then bent on safeguarding the dominions it had won from competing powers and desired no further expansion. That explains its then policy of non-intervention and the several treaties it concluded with the princes.

(*ii*) *From* 1813 *to the Mutiny of* 1857.—The East India Company concluded further treaties which recognised the paramountcy of the Crown, while the States were left sovereign and independent internally, except when disloyalty or disorder

within the States called for an armed intervention from and annexation by the Company. The expressions 'mutual alliance' and 'reciprocal agreement' in the prior treaties were changed to 'subordinate alliance,' 'protection' and ' subordinate co-operation' in the treaties of this period.

(*iii*) 1857-1909.—The policy of annexation was dropped and a new policy of co-operation and partnership was substituted. The Crown brought into existence a Political Department to rule in place of the Company. But this change tended to aggrandize the paramount power and minimise the rights of the States. In fact, the Viceroyalty of Lord Curzon made the princes very apprehensive of internal intervention and it was not till Lord Minto in his famous Udaipur speech in 1909 guaranteed internal independence and external protection that their fears were allayed.

(*iv*) *From* 1909 *to the present day*.—The Imperial Government assumed a certain decree of responsibility for the general soundness of the State's administration to avoid its being said that they indirectly allowed misrule to prevail. This was emphasised by Lord Hardinge at Jodhpur when he called them as "helpers and colleagues in the great task of Imperial rule". We now find in many of the principal States 'a responsiveness to modern political ideas,' legislative councils, High Courts, separation of judiciary and executive and other modern ideas have been introduced in several of them and the efficiency of the government thereby increased. The Courts in the States are also governed by practically the same law as in British India. This development of the States has now elevated their relationship to the paramount power from that of 'dependent and superior' to 'junior and senior partners'.

The professor states that as the relationship between the Indian Princes and the Crown has a 'concensual' basis—(*i*) treaties, sanads and engagements, (*ii*) custom and political practice consented to by the States, the Crown cannot cede its rights and duties to any other State, including in the word "State" British India. According to the professor, it is this principle that was applied by Montague-Chelmsford Report when they recommended that the affairs of all the States should be placed under the control of the Government of India. The present Report of the Butler Committee has gone a step further and recommended that the relations between the Paramount Power and the States shall be handed over to the Viceroy

taking it out of the Governor-General-in-Council. The argument advanced is that the growth of responsibility will unfit the Ministers in British India responsible primarily to the Legislature from acting as the agents of the Government of India.

On the economic question—namely, such matters as maritime customs, railways, mints, coinage, salt, post office, opium, excise—the Committee felt that it would be premature to accept the suggestion of a federal constitution for India under the Crown, the States aid Provinces of British India being the constituent units and they accordingly recommended the continuance of the existing system with certain modifications. In the event of differences between themselves and the Government of India or between one or more States, the Paramount Power's right to decide by a fiat without a judicial enquiry is not taken away. But in questions of a legal nature, enquiry by Committees set up by the Viceroy to report to him has been recommended where the States and British India are to be represented. The professor concludes with a strong plea that whatever may happen to British India, the Princes and the Indian States are not to be handed over to the British India as they are entitled to demand that the Paramount Power should remain in India to fulfil its obligations under the treaties, etc., towards the Princes, who observed their part of the treaty by helping the British rule during the dark days of the Mutiny and the Great War.

BOOK REVIEWS.

THE CODE OF CRIMINAL PROCEDURE, by S. Roy. Published by Messrs. Butterworth & Co., Ltd. (India). Price Rs. 16.

In this book, the learned author has taken considerable pains to collect the entire case-law under each section. We find however with regard to some of the section, the author has not attempted to consider the effect of the recent amendments on the cases he has given in his notes. For example, in dealing with the power of Court to pass separate sentences, the effect of the deletion of the word 'distinct' before 'offence' in section 35 is not discussed; nor is the amendment of section 397 considered on the question of legality of concurrent sentences

where the accused is convicted at different trials. Again under section 88, the author has cited the cases which held that the Court was not bound to consider claims of third parties, without comment or explanation, although sub-section (6) (*a*) of the present section expressly provides for enquiry. With regard to the text of the sections, some of the amendments introduced after 1923 appear to have been omitted. The get-up and printing seem to be good. We wish the author every success in this, his first attempt at a commentary on the Criminal Procedure Code.

THE CODE OF CRIMINAL PROCEDURE, by K. N. Katju, M.A., LL.D. & S. C. DAS, M.A., LL.D. Published by the Allahabad Law Journal Press. Price Rs. 5-8-0.

We welcome the publication of this book by Messrs. K. N. Katju and S. C Das. The need for an accurate text of the Code of Criminal Procedure was keenly felt by the legal public, especially as the commentaries on the Code that have been published recently are far from satisfactory in this respect. We have no doubt that the learned authors have succeeded in their first and foremost object of providing an "absolutely reliable and correct text of the Act as amended up to the date of publication." Notes of case-law are given under the different sections and it is gratifying to note that no case of importance, old or new, has been omitted. The get-up is excellent.